IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 71 OF 2005
WITH
CIVIL APPLICATION (ST.) NO. 14053 OF 2005

Sumitra Devgonda Patil ... Appellant

V/s

Bhalchandra Kalgonda Patil & ors. ... Respondents

ALONGWITH

SECOND APPEAL (ST.) NO. 14050 OF 2005
WITH
CIVIL APPLICATION (ST.) NO. 14051 OF 2005

Sumitra Devgonda Patil ... Appellant

V/s

Bhalchandra Kalgonda Patil & ors. ... Respondents

Mr. P.R. Arjunwadkar for the appellant in both appeals.

Mr. T.S. Ingale for the respondent No.1 in both appeals.

Mr. M.L. Patil for Respondent Nos.3 to 12 in both appeals.

CORAM: P.V. KAKADE, J.

DATED: 21ST JUNE, 2005

P.C.:

1. Both the appeals are being disposed of by this order since the parties as well as the issues involved are

common.

2. The appellant has preferred the appeal against the judgment and order passed by the Ad-hoc Addl. District Judge, Kolhapur dated 2.11.2004 allowing both the appeals and dismissing the suit of the plaintiff and thereby setting aside the order passed by the Joint Civil Judge, Sr.Divn., Kolhapur dated 30.9.1994 decreeing the suit for declaration and injunction.

3. The plaintiff filed the suit inter-alia submitting that on 26.4.1958 deceased Balasaheb Appa Patil had mortgaged half portion of original R.S. No. 335/1 for Rs.1300/- under the registered mortgage deed to one Rama Dudhappa Latthe. Said Rama filed R.C.S. No. 131/71 and obtained a decree of fore-closure against deceased Balasaheb on 13.9.1984. Final decree application No. 26/79 came to be filed on 13.9.1984. During the pendency of that final decree application, deceased Balasaheb died and plaintiff appeared in the proceeding and he was accepted as a legal heir of deceased Balasaheb. Plaintiff deposited the entire mortgage money and consequently, mortgaged property was decreed in favour of the present plaintiff. Deceased Balasaheb was admitted in the hospital on 3.9.1984. On 10.9.1984

he was shifted to another hospital at Ichalkaranji. He was seriously ill and was not having sense on account of illness and was not fit to execute any document. He had not executed the will dated 22.10.1984 in favour of defendant No.1. The alleged will was forged and fabricated document. According to the plaintiff, he also not executed the said power of attorney which is the bone of contention and is said to be forged and fabricated document. On the basis of such document of power of attorney, the attorney holder executed a registered sale deed of the suit property in favour of defendant No.1 on 2.11.1984. According to the plaintiff, the defendants have got executed false and fabricated documents and deeds, which according to the plaintiff, are not binding upon him. It was further alleged that during the life time of Balasaheb, the suit properties came in possession of the plaintiff and after the death of said Balasaheb, the suit properties are in possession, occupation and in use of the plaintiff and hence the suit decree for perpetual injunction was also sought.

The defendant No.2 though served, was absent and the suit was contested by defendant Nos. 1 and 3 to 13 denying all the allegations made by the plaintiff

against the defendants including the contention that the suit was barred by limitation.

4. The learned Trial Judge adjudicated the dispute on merits and came to the conclusion on the basis of plaintiff's evidence that the plaintiff had not proved that he was the only legal heir of deceased Balasaheb though he had proved that the suit properties were impartible lands due to its nature. However, the factum of mortgage was also held to be proved. It was further held that the plaintiff had proved that the alleged agreement as well as the power of attorney dated 2.11.1984 were false and fabricated documents as alleged to have been executed by the deceased. The consequent reliefs were also held in favour of the plaintiff and as such the suit came to be decreed in favour of the plaintiff.

5. The appeal was carried to the District Court. The learned Addl. District Judge heard both sides and came to the conclusion that the judgment and decree passed by the learned Trial Judge was erroneous. It was also held that the plaintiff had not established that he was exclusive owner of the suit property by virtue of his relation with deceased Balasaheb. It was also held that

the plaintiff had not proved that the power of attorney dated 2.11.1984 was forged and fabricated document. The suit was also held to be barred by bar of limitation alongwith other aspects. After recording the findings, the learned lower appellate Court Judge came to the conclusion that the appeal deserves to be allowed and, as such, both the appeals came to be allowed and the suit came to be dismissed. Hence the present appeal.

6. At the outset, it may be noted that the substantial question of law sought to be raised is the issue regarding limitation. In this regard, it was submitted on behalf of the appellant that in the Trial Court the issue was not raised regarding the bar of limitation to the suit and it was raised for the first time i.e. at the time of arguing the first appeal before the lower appellate Court and hence the said issue should not be taken into account. In support of this argument, the learned counsel for the appellant sought to put reliance on the ruling of the Apex Court in the case of **The Municipal Corporation, Indore v/s Niyamatulla, reported in A.I.R. 1971 SC 97,** wherein it was observed that if the plea of special period of limitation as defence is raised and when the plea was not taken in pleadings or in Trial Court, then the appellate Court should not

entertain such plea. However, perusal of this judgment makes it clear that this is not applicable to the present case, firstly due to the reason that the plea of bar of limitation was taken up by the defendants in their written statement, however, no specific issue was raised by the Trial Court in that regard and, therefore, that issue was exhaustively argued before the lower appellate Court and it cannot be said that the present appellant had no opportunity to meet the said issue when it was so argued. The learned counsel for the appellant submitted that the plaintiff had no opportunity to lead evidence in that regard. However, the facts revealed from the record show that there was no question of leading any evidence in that regard as it was the pure question of law to be determined on the basis of facts available on record and also in fact on the basis of averments made in the plaint itself. Therefore, it cannot lie in the mouth of the appellant-plaintiff today that any prejudice is caused to him due to the fact that the Trial Court did not frame specific issue regarding limitation.

Now it is the appellant-plaintiff’s case that the power of attorney was executed on 2.11.1984 and the sale deed in favour of the defendants was executed on the same day

and thereafter defendant No.1 executed the sale deed in favour of other defendants. It is the plaintiff's case that he came to know about the said sale deed and power of attorney on 24.4.1985. The suit is for declaration about the sale deed as well as power of attorney dated 2.11.1984 filed under the provisions of Sec. 34 of the Specific Reliefs Act. The learned lower appellate Court, in view of this position, had come to the conclusion that since the suit is for declaration to the effect that the documents are bogus and sham and, therefore, not binding upon the plaintiff, the dispute is governed by the provisions of Art. 58 of the Limitation Act which provides period of 3 years and the time of limitation starts when the right to sue first accrues. In the present case, the plaintiff has averred in the plaint that he came to know about the forged and false documents on 24.2.1985 and, therefore, the cause of action accrues on that day and not in the year 1990. The period of limitation, therefore, starts running from 24.4.1985 and the limitation starts running from that day. In view of this aspect it is held that the plaintiff ought to have filed the suit within three years from 24.4.1985 but the suit was actually filed in the year 1992 and, therefore, was barred by law of limitation.

7. In the course of his argument, the learned counsel for the appellant sought to put reliance in the case of **Manchharam Pranjivandas v/s Panubhai Lallubhai, reported in 1915 Bom.L.R. Vol.XVII 698,** wherein it was held that a suit by a reversioner to recover possession of property alienated by a Hindu widow, is not governed by Art.91 of the Indian Limitation Act (old Limitation Act) when the impeached alienation is found to be sham. In other words, it is sought to be canvassed that Art. 58 of the present Law of Limitation is not at all applicable and in fact the plaintiff could file the suit within 12 years from the date of his accruing of cause of action. I have critically perused the relevant record as well as the evidence brought to my notice by the learned counsel for the appellant. However, I prefer to disagree with this proposition. Art. 58 of the Limitation Act is specific enough to show that the period of limitation would be three years since the date of accruing the right to sue first arose. In the present case, the very pleadings of the plaintiff are sufficient to negate his argument in this regard and I must hold that the suit is barred by limitation and the learned lower appellate Court has rightly concluded that the suit is liable to be dismissed on that count. It is

also to be noted that no prejudice is seen to have been caused to the plaintiff by dismissal of the suit on the basis of bar of limitation by the lower appellate Court because it is a pure question of law based on the pleadings of the plaintiff himself and, therefore, it cannot be said that it is a mixed question of law and fact and, therefore, the plaintiff did not get the opportunity to lead evidence in that regard. Be that as it may. The fact remains that the suit is clearly barred by law of limitation under Art. 58 of the Limitation Act and, as such, both the appeals are liable to be dismissed on that count alone.

8. The learned counsel for the appellant also sought to raise various aspects based on the evidence on record, however, I am satisfied that those are not the substantial questions of law but are the issues of fact which could not be determined and agitated in the second appeal.

9. In the result, both appeals have no merits and stand dismissed.

Consequently, in view of the facts and circumstances Civil Application No. 14053 of 2005 is made absolute in

terms of prayer clause (a) and stands disposed of.

Consequiently, Civil Application No. 14051 of 2005 filed in Second Appeal (St.) No. 14050 of 2005 stands disposed of accordingly.

(P.V. Kakade, J.)